No. 09-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SCHOOL DISTRICT OF THE CITY OF PONTIAC, LEICESTER TOWN SCHOOL DISTRICT, NESHOBE ELEMENTARY SCHOOL DISTRICT, OTTER VALLEY UNION HIGH SCHOOL, RUTLAND NORTHEAST SUPERVISORY UNION, PITTSFORD TOWN SCHOOL DISTRICT, SUDBURY TOWN SCHOOL DISTRICT, WHITING TOWN SCHOOL DISTRICT, THE NATIONAL EDUCATION ASSOCIATION, THE CONNECTICUT EDUCATION ASSOCIATION, THE ILLINOIS EDUCATION ASSOCIATION, THE INDIANA STATE TEACHERS ASSOCIATION, THE MICHIGAN EDUCATION ASSOCIATION, NEA-NEW HAMPSHIRE, THE OHIO EDUCATION ASSOCIATION, THE READING EDUCATION ASSOCIATION, THE TEXAS STATE TEACHERS ASSOCIATION, THE UTAH EDUCATION ASSOCIATION, and the VERMONT NEA,

Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

PHILIP A. HOSTAK
NATIONAL EDUCATION ASSOCIATION
Office of General Counsel
1201 16th Street NW
Suite 820
Washington, DC 20036
(202) 822-7035

JEREMIAH A. COLLINS
Counsel of Record
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, NW
Suite 1000
Washington, DC 20005
(202) 842-2600

Attorneys for Petitioners

January 14, 2010

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

DENNIS POLLARD
419 Puritan Ave.
Birmingham, MI 48009
(248) 988-5690

Counsel for Petitioner
School District of the
City of Pontiac

QUESTION PRESENTED

Section 9527(a) of the No Child Left Behind Act of 2001 states as follows:

> Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

The question presented is whether, given that provision, Congress provided clear and unambiguous notice, as required by this Court's Spending Clause jurisprudence, that the acceptance of funds under the Act by States and school districts is conditioned upon an obligation that they spend their own funds and incur costs to comply with requirements of the Act even if the Federal funding provided under the Act falls far short of paying for the costs of satisfying those requirements.

PARTIES TO THE PROCEEDING

In addition to the Petitioners, which are listed on the cover, the Laredo Independent School District was a plaintiff/appellant in the proceedings below.

The Respondent is the Secretary of the United States Department of Education.

CORPORATE DISCLOSURE STATEMENT

The National Education Association, the Connecticut Education Association, the Illinois Education Association, the Michigan Education Association, the Ohio Education Association, the Utah Education Association, the Indiana State Teachers Association, the Texas State Teachers Association, NEA-New Hampshire, the Vermont NEA, and the Reading Education Association are organized as nonprofit corporations. None has a parent corporation, nor does any publicly held company own any stock in any one of these non-profit corporations.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan is unpublished and is reproduced at Pet. App. 1a-9a. The opinion of the three-judge panel of the Sixth Circuit, which the Sixth Circuit subsequently vacated upon granting the Secretary's petition for rehearing, is published at 512 F.3d 253, and reproduced at Pet. App. 10a-74a. The *en banc* Sixth Circuit's order affirming the District Court's judgment of dismissal by an equally divided vote, and the opinions accompanying that order, are published at 584 F.3d 253, and reproduced at Pet. App. 78a-79a, 80a-201a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit, sitting *en banc*, entered judgment on October 16, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 8, Clause 1 of the United States Constitution, known as the Spending Clause, provides in relevant part as follows: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."

Section 9527 of the No Child Left Behind Act, Pub. L. 107-110, 115 Stat. 1425 (2002) ("NCLB"), codified at 20 U.S.C. § 7907, states as follows:

PROHIBITIONS ON FEDERAL GOVERNMENT AND USE OF FEDERAL FUNDS.

(a) GENERAL PROHIBITION.—Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

(b) PROHIBITION ON ENDORSEMENT OF CURRICULUM.--Notwithstanding any other prohibition of Federal law, no funds provided to the Department under this Act may be used by the Department to endorse, approve, or sanction any curriculum designed to be used in an elementary school or secondary school.

(c) PROHIBITION ON REQUIRING FEDERAL APPROVAL OR CERTIFICATION OF STANDARDS.—

(1) IN GENERAL.—Notwithstanding any other provision of Federal law, no State shall be required to have academic content or student academic achievement standards approved or certified by the Federal Government, in order to receive assistance under this Act.

(2) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to affect requirements under title I or part A of title VI.

(d) RULE OF CONSTRUCTION ON BUILDING STANDARDS.—

Nothing in this Act shall be construed to mandate national school building standards for a State, local educational agency, or school.

INTRODUCTION

This case involves a question of exceptional national importance warranting review by this Court: whether, notwithstanding the prohibition in NCLB Section 9527(a) against requiring States or school districts "to spend any funds or incur any costs not paid for under this Act," the Secretary may require that States and school districts spend their own funds to pay for the substantial costs of complying with the NCLB's numerous and costly requirements, where the federal funds provided under the NCLB fall far short of covering the costs of those requirements.

Because Congress enacted the NCLB pursuant to the Spending Clause of the United States Constitution, analysis of this question is governed by the "clear notice" rule governing the interpretation of Spending Clause legislation, developed in a line of cases beginning with *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and reiterated and applied most recently in *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006). Under this rule, Congress must "set out unambiguously" any condition that it attaches to the receipt of federal funds, so that those conditions can be accepted "voluntarily and knowingly." *Arlington*, 548 U.S. at 296 (quoting *Pennhurst*, 451 U.S. at 17.)

The Secretary has taken the position that, notwithstanding Section 9527(a), States and school districts must comply with each and every one of the NCLB's many costly requirements, regardless of whether the Federal Government has provided sufficient funding to pay for the extra costs that compliance entails, and no matter how far short the Federal funding may have fallen. Thus, on the Secretary's view, States and school districts, by accepting federal funds, can be required to bear anywhere from zero to one hundred percent of those federally mandated compliance costs.

Resolution of the question whether the Secretary's position is permissible is of enormous consequence to States and school districts, which, as a result of the Secretary's position and of the Federal Government's failure to provide sufficient funds, have been forced to divert their own funds to pay for substantial costs that would not exist but for the Federal requirements set forth in the NCLB, at the expense of the educational programs to which these State and local funds would otherwise be directed.

In this case, the District Court accepted the Secretary's interpretation as a matter of law and, on that basis, dismissed the case on the pleadings. After the Sixth Circuit reversed in a divided panel decision, the court vacated that decision and then affirmed the District Court's decision by an evenly divided vote of the *en banc* court.

Review is warranted because of the importance of the issue and because both the District Court and the members of the Court of Appeals who agreed with the District Court's decision on the merits reached their conclusions by evading the clear notice rule in a

manner that is contrary to this Court's decision in *Arlington*.

STATEMENT OF THE CASE

I. THE NO CHILD LEFT BEHIND ACT

The No Child Left Behind Act is the latest iteration of the Elementary and Secondary Education Act of 1965 ("ESEA"), Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. § 2701 *et seq.*), which, as reauthorized and amended from time to time, has been the principal statutory scheme governing Federal primary and secondary education spending for more than four decades. With the enactment of the NCLB in 2002, Congress made far-reaching amendments to the ESEA scheme, greatly expanding Federal involvement in education and affecting all the nation's public schools.

The NCLB sets as its overall goal that all children in the nation's public schools be "proficient" in reading and mathematics by the year 2014.[1] The NCLB seeks to achieve that ambitious goal through the creation of unprecedented Federal requirements relating to instructional content and academic achievement standards, annual tests aligned to those standards, teacher and paraprofessional qualifications, data-collection and reporting, assessments of school and school district performance, and corrective actions to be taken when schools' perfor-

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[1] This goal is expressed in the "Timeline" section of the Act, which states that "[e]ach State shall establish a timeline for adequate yearly progress" and that "[t]he timeline shall ensure that not later than 12 years after the end of the 2001-2002 school year, all students in each group . . . will meet or exceed the State's proficient level of academic achievement on the State assessments . . . ." 20 U.S.C. § 6311(b)(2)(F).

mance falls short of benchmarks designed to ensure one hundred per cent proficiency by 2014.

Title I, Part A of the NCLB imposes the following requirements on States and school districts:

- *Curriculum and Achievement Standards Requirements*: The NCLB requires States to develop and implement "challenging" standards for "academic content" as well as "challenging student achievement standards" that are aligned with those content standards. 20 U.S.C. § 6311(b)(1)(A), (D).

- *Testing Requirements*: States must develop, and school districts must implement, a statewide testing regime, which must include math and reading tests administered annually to students in grades 3-8 and once more while students are in grades 10-12. And, as of the 2007-2008 school year, school districts also must administer science tests for students in grade ranges 3-5, 6-9, and 10-12. *Id.* § 6311(b)(3)(C). In all, the law requires the administration of no less than seventeen different annual standardized tests, which must meet a host of statutory criteria. *Id.* § 6311(b)(3)(C)(i)-(xv).

- *Data-Gathering, Grading, and Reporting Requirements*: Based primarily on student performance on NCLB-mandated tests, States and school districts must annually grade and publicly report on the performance of all schools, designating them as making or failing to make "Adequate Yearly Progress" ("AYP"). These evaluations must show aggregate results as well as results broken down

into statutorily prescribed subgroups. *Id.* §§ 6311(b)(2), 6311(h)(1)-(2), 6316(a)(1)(A)-(B).

- *School Improvement Requirements*: If a school does not achieve AYP within prescribed timelines, States and school districts must take actions against the schools and school districts that fall short. States and school districts are not free to take whatever actions they deem appropriate, but must instead pick from a menu of options specified by the statute, which range from permitting all students to transfer from such schools to replacing the staff, reopening the school as a charter school, or contracting the operation of the school to a private company. *Id.* § 6316(b)(7).[2]

In the NCLB, Congress authorized the appropriation of unprecedented amounts of Federal funds to enable states and school districts to comply with these extensive requirements. The Act specifies that Congress is authorized to appropriate grants to school districts to carry out the NCLB Title I mandates totaling $13.5 billion in fiscal year ("FY") 2002, $16 billion in FY 2003, $18.5 billion in FY 2004, $20.5 billion in FY 2005, $22.75 billion in FY 2006 and $25 billion in FY 2007. *See* 20 U.S.C. § 6302(a). These unprecedented authorization levels reflect Congress's understanding that "significant and annual increases in Title I authorizations" would be required to provide states and school districts with the Federal resources needed "to implement fully the

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[2] Other titles of the NCLB prescribe further requirements, such as the requirement in Title II, Part A that teachers and paraprofessionals meet statutorily prescribed qualification requirements. *Id.* § 7801(23)(A); *id.* § 6319(d).

reforms incorporated in the [NCLB]." H.R. Conf. Rep. No. 107-334, at 693 (2001).

However, the actual appropriations under the NCLB have been far below the authorized levels. By way of illustration, the complaint documents that Congress appropriated $30.8 billion dollars less for Title I grants to school districts from fiscal year 2002 to fiscal year 2006 than it had authorized for those purposes in the NCLB. Pet. App. 19a. And the complaint alleges that the Federal funds provided to the States and school districts have been far below the levels that would be needed to pay for the costs of complying with the NCLB's extensive requirements.

The NCLB carries forward the ESEA's long-standing maintenance-of-effort and supplement-not-supplant provisions, which are designed to prevent States and school districts from using Federal funds to pay for programs that the States and school districts would pay for in the absence of those Federal funds. 20 U.S.C. § 6321. The maintenance-of-effort provision requires that a school district must, in order to receive Federal funds in a given year, maintain its financial support at a level that is at least ninety percent of amount of its financial support from the previous year. *Id.* §§ 6321(a), 7901(a). The supplement-not-supplant provision requires that States and school districts use their federal funds only "to supplement the funds that would, in the absence of such federal funds, be made available from non-federal sources for the education of pupils participating in programs assisted under [the NCLB], and not to supplant such funds." *Id.* § 6321(b).

At the same time, Congress also included in the NCLB Section 9527(a)—the only provision in the Act that speaks directly to the obligation *vel non* of States

and school districts to use non-Federal funds to pay for NCLB compliance. That provision, set forth within the "General Provisions" of Title IX of NCLB, states, in full, as follows:

> PROHIBITIONS ON FEDERAL GOVERNMENT AND USE OF FEDERAL FUNDS.
>
> (a) GENERAL PROHIBITION.—Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

II. PROCEEDINGS AND DISPOSITION BELOW

Petitioners filed suit against the Secretary on April 20, 2005, alleging that the Secretary was violating the Spending Clause and the terms of Section 9527(a) "by changing one of the conditions pursuant to which states and school districts accepted federal funds under the NCLB—*viz.*, that states and school districts would not be required to spend any funds or incur any costs not paid for under this Act." Pet. App. 4a. Plaintiffs' complaint sets forth detailed allegations that Congress has not provided States and school districts with Federal funds that are remotely sufficient to pay for full compliance with the Act.

Despite this shortfall in Federal funding—and despite assurances in the early years of the program by then-Secretary Roderick Paige that the NCLB "contains language that says that things that are not

funded are not required" and that "if it's not funded it's not required," Pet. App. 161a—the Secretary has insisted that States and school districts must comply with each and every one of the NCLB's requirements, Pet. App. 23a, 161a. The Secretary's insistence that school districts comply with all NCLB requirements has forced the plaintiff school districts to divert funds from existing programs to comply with NCLB requirements. Pet. App. 23a, 93a.

The Secretary moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and (6), arguing that none of the plaintiffs had standing to bring the lawsuit and that, in any event, NCLB Section 9527(a) did not support plaintiffs' claim. Pet. App. 5a. The District Court held that the plaintiffs had adequately alleged a basis for standing but agreed with the Secretary's position on the merits and dismissed the complaint under Rule 12(b)(6). Pet. App. 6a-9a. In so doing, the District Court adopted the Secretary's argument that Section 9527(a) "clearly" means only that Federal officers and employees are prohibited "from imposing additional, unfunded requirements, beyond those provided for in the statute," and "cannot reasonably be interpreted to prohibit Congress itself from offering federal funds on the condition that States and school districts comply with [the NCLB's] many statutory requirements." Pet. App. 9a.

Plaintiffs appealed. Plaintiffs were supported by *amici curiae* urging reversal, including seven States (Connecticut, Delaware, Illinois, Maine, New Mexico, Oklahoma, and Wisconsin) and the District of Columbia. The brief filed by those jurisdictions made clear that when each of them "opted to participate in the NCLB programs [they] understood, based on the plain language and statutory context of [Section

9527(a)], that neither states nor local school districts would be required to spend their own funds to comply with the NCLB mandates." *Amici Curiae* Brief of the States of Connecticut, Delaware, Illinois, Maine, New Mexico, Oklahoma, Wisconsin, and the District of Columbia, in *School District of the City of Pontiac, et al. v. Secretary of U.S. Department of Education*, 6th Cir. No. 05-2708, at 2.

A divided panel of the Sixth Circuit reversed the District Court. App. 10a-74a. The majority concluded (1) that the school district plaintiffs had standing to raise the claims in the lawsuit; and (2) that in light of Section 9527(a), the NCLB did not provide clear notice, as required by this Court's Spending Clause jurisprudence, that acceptance of NCLB funds by States and school districts is conditioned on their agreement to spend their own funds to comply with NCLB requirements in the event that Federal funds are insufficient. Pet. App. 10a-50a. The dissent argued that Section 9527(a) operates only to make clear that the NCLB is a voluntary program under which States are entitled to opt out if they believe that the burdens of participation outweigh the benefits. Pet. App. 51a-74a.

The Sixth Circuit granted the Secretary's petition for rehearing *en banc*, thereby vacating the panel decision and reinstating the case as an active appeal from the District Court's judgment dismissing the case. Pet. App. 75a. The parties submitted supplemental briefs and the *en banc* Sixth Circuit heard oral argument on December 10, 2008. After the argument, the Court of Appeals ordered further briefing on a number of issues that had not previously been raised or briefed, including whether plaintiffs' claims were ripe and whether the claims could

properly be resolved without the participation of the States in which the school district plaintiffs are located. Pet. App. 76a-77a.

On October 16, 2009, the Sixth Circuit issued an order affirming the District Court's dismissal by an evenly divided vote of the sixteen judges in active service. Pet. App. 78a-79a. In connection with that order, the court issued four separate opinions.

Thirteen of the sixteen judges concluded that the issue of whether States and school districts could be required to spend their own funds to comply with the NCLB was properly before the court.[3] But no position on the merits of the issue commanded a majority.

Thirteen judges stated conclusions on the merits. Seven agreed with plaintiffs that, in light of Section 9527(a), "a state official would not clearly understand

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[3] Those judges concluded that the school district plaintiffs had standing to sue, that the case was ripe, and that dismissal under Fed. R. Civ. P. 19 was not warranted by reason of the non-joinder of Michigan, Vermont, and Texas as parties. *See* Pet. App. 90a-106a (opinion of Cole, J., joined by Martin, Daughtrey, Moore, Clay, Gilman, and White, JJ., and joined in pertinent part by Gibbons, J.); 127a-137a (opinion of Sutton, J., joined by Batchelder, C.J., and Boggs, Cook, and Kethledge, J.J.). Three judges concluded that the case was not ripe and, alternatively, should be dismissed under Rule 19 by reason of the non-joinder of Michigan, Texas, and Vermont as parties. Pet. App. 165a-195a (Opinion of McKeague, J., joined in pertinent part by Rogers and Griffin, J.J.). The Rule 19 issue was raised for the first time in Judge McKeague's opinion, and was never briefed by the parties. *See* Pet. App. 131a. Hence, the substantial discussion of the grounds for rejecting the notion that the case should be dismissed under Rule 19 that appear in the opinions of Judge Cole and Judge Sutton were responses to Judge McKeague's having introduced the issue for the first time in his *en banc* opinion.

that accepting federal NCLB funds meant agreeing to use state and local funds to meet [NCLB-required] goals rendered otherwise unreachable by deficient federal funding." Pet. App. 113a (opinion of Cole, J., joined by Martin, Daughtrey, Moore, Clay, Gilman, and White, JJ.). Six judges, however, agreed with the Secretary's view that the NCLB "clearly requires the States (and school districts) to comply with its requirements, whether doing so requires the expenditure of state and local funds or not." Pet. App. 141a (opinion of Sutton, J., joined by Batchelder, C.J., and Boggs, Cook, and Kethledge, J.J., and joined in pertinent part by McKeague, J.).[4]

Judge Cole, writing for the seven-judge plurality, reached the conclusion that the "clear notice" rule does not permit the Secretary to require States or school districts to spend their own funds on NCLB compliance. Noting this Court's admonition that, ""'in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly,'" Pet. App. 112a (quoting *Pennhurst*, 451 U.S. at 17-18), Judge Cole concluded that "[h]ere, no such provision exists. NCLB simply does not include any specific, unambiguous mandate requiring the expenditure of non-NCLB funds." Pet. App. 113a. "To the contrary," Judge Cole continued, "[b]ased on [Section 9527(a)], a state official likely would reach the opposite conclusion—namely, that her State would not be forced to provide funding for NCLB

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[4] Judge Gibbons filed a separate opinion in favor of reversal, concluding that the plaintiffs stated a claim sufficient to withstand a motion to dismiss under Rule 12(b)(6), but that a definitive answer to the merits question should await further development of the record on remand. Pet. App. 196a-201a.

requirements for which federal funding falls short." *Id.*

Judge Cole then carefully considered the two alternative interpretations urged by the Secretary—*i.e.*, (1) that Section 9527 (a) "merely prevents officers and employees of the federal government from imposing additional, unauthorized requirements on the participating States"; and (2) that Section 9527(a) "simply emphasizes that state participation in the NCLB is entirely voluntary"—but found neither to be a "self-evident" reading of the provision such as would dispel any ambiguity in Section 9527(a) or render plaintiffs' reading of the provision implausible. Pet. App. 116a, 117a-123a.

Judge Cole noted that the interpretations proffered by the plaintiffs and the Secretary were each in some ways "plausible" and in some ways "flawed;" but he emphasized that the "relevant inquiry" is "not [to] decide which of the . . . interpretations is correct," but rather "'whether . . . a state official would clearly understand . . . the obligations'." Pet App. 124a (quoting *Arlington*, 548 U.S. at 296). Given the conclusion that Section 9527(a) can plausibly be construed as requiring compliance with all of the NCLB's requirements only to the extent that they are paid for by Federal funds, Judge Cole concluded, "the answer must, therefore, be 'No.'" *Id.*

In reaching the contrary conclusion, Judge Sutton's opinion adopted an entirely different mode of analysis. Rather than beginning with the text of the statutory provision at issue, Judge Sutton took as a starting point his characterization of the purpose of the NCLB. Pet. App. 141a-151a. Relying on an admittedly "broad brush strokes" description of "the basic bargain underlying the Act"—*viz.*, that the

Federal Government provides "substantial funds" plus "substantial flexibility" in exchange for "accountability" for results on the part of States and school districts—Judge Sutton posited that the overriding purpose of the entire Act is "accountability." Pet. App. 141a-142a. From that premise, Judge Sutton reasoned that allowing States and school districts to pare back their compliance efforts based on inadequate funding would "break the accountability backbone of the Act," making "it hard if not impossible to hold them accountable for meeting the Act's goals." Pet. App. 144a.

After devoting the bulk of analysis to these general-purpose-based reasons why Section 9527(a) cannot plausibly mean what plaintiffs interpreted it to mean, Judge Sutton's opinion briefly addressed what the provision *does* mean. At the close of the discussion, Judge Sutton's opinion posited that the provision merely plays the "modest role" of confirming that, by enacting the NCLB, the Federal Government is not telling the States and school districts how to develop their own local educational programs with their own funds:

> The section merely re-enforces the flexibility that the Act gives to school districts in developing their *own* local programs and spending their *own* funds in tackling local education matters. It functions as an anti-commandeering rule of construction, nothing more. [Pet. App. 156a (emphasis in original).]

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE WITH MAJOR FINANCIAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS

This case involves a question of exceptional national importance warranting review by this Court: whether, notwithstanding NCLB Section 9527(a), the Secretary may require that States and school districts spend their own funds to pay for the substantial costs of complying with the NCLB's numerous and costly requirements, even if the Federal funds provided under the NCLB are grossly insufficient to pay for compliance with those requirements.

The resolution of this question is of enormous consequence to States and school districts. Because the funds the Federal Government has provided to States and school districts do not come close to covering the costs of complying with the NCLB's requirements, the Secretary's insistence that States and school districts must nevertheless comply with each and every requirement of the Act means that States and school districts must divert their own funds to pay for substantial costs that would not exist but for the Federal requirements set forth in the NCLB, in amounts that depend on the vagaries of NCLB appropriations from year to year.

The hardships this places on States and school districts, requiring them to cut back on other educational programs in order to toe the line of NCLB compliance, have only become more severe since the filing of this lawsuit in 2005, both because the costs

of compliance, by statutory design, have increased[5] and because States and school districts throughout the nation are confronting a fiscal crisis of the first magnitude. Review of this question is thus particularly appropriate at this time and in this case.

In this connection, the fractured nature of the Sixth Circuit's decision further argues in favor of review. Due to the equal division of the *en banc* court, the District Court's decision stands affirmed, although none of the sixteen members of the *en banc* court endorsed the reasoning of that opinion. Petitioners' submission on the merits was accepted by more members of the Sixth Circuit than rejected it, but the court ended up evenly divided on whether to affirm the District Court's dismissal of the case, due to the fact that three judges, expressing a view rejected by the other thirteen, declared that the case was not justiciable. The result is to leave it completely uncertain whether, under this nation's principal statute governing public education, States and school districts can be required to spend enormous and unpredictable amounts of their own resources to comply with requirements that the Federal Government has dictated but has failed to

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[5] Many of the NCLB mandates are backloaded and take full effect only in the out years of the program. For example, when the NCLB was first enacted, school districts were required to annually administer six standardized tests—math and reading/language arts tests to students in each of three different grade ranges (3-5, 6-9, and 10-12). 20 U.S.C. § 6311(b)(3)(C). But the NCLB now requires school districts to annually administer seventeen standardized tests—math and reading/language arts tests to students in every grade from 3-8 and, once more, to students while they are in grade range 10-12, as well as testing in science for students in each of three different grade ranges (3-5, 6-9, and 10-12). *Id.*

fund.[6] Given this Court's recognition of the importance that States and local governments be clearly informed of the obligations they will be assuming if they participate in a program enacted pursuant to the Spending Clause, this Court should grant review to settle this matter.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S SPENDING CLAUSE JURISPRUDENCE BY EVADING THE GOVERNING CLEAR NOTICE RULE

Review also is warranted because the *en banc* Sixth Circuit's affirmance, essentially by default, of the District Court's dismissal of Petitioners' claim leaves in place a decision that is contrary to this Court's Spending Clause jurisprudence, and Judge Sutton's opinion for the six members of the *en banc* Court who agreed with the District Court on the merits adopted a mode of analysis that amounts to an evasion of the clear notice rule.

A. In *Arlington*, this Court refused to construe the word "costs" in a fee-shifting provision within the

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[6] The question presented here has been raised in one other pending case, *Connecticut v. Spellings*, 549 F. Supp. 2d 161 (D. Conn. 2008), which is currently before the Second Circuit. But that case arises in a very different posture—Connecticut's effort to secure judicial review of the Secretary's denial of Connecticut's proposed amendments to its NCLB State Plan—and the District Court dismissed Connecticut's Section 9527(a)-based Spending Clause claim on the ground that it had not been presented to the Secretary in the administrative proceedings sought to be reviewed. *See id.* at 177-78. It is thus unlikely that any judicial decision on the merits of the question will issue in the near future.

Individuals with Disabilities Education Act ("IDEA") to require a school district to reimburse parents for the expert fees they incurred in bringing a successful IDEA action against the district. In rejecting the Secretary's attempt to impose that obligation on school districts, the Court made clear that, in applying the clear notice rule in a Spending Clause case, "we begin with the text." 548 U.S. at 296. Reasoning that the word "costs" is not generally understood to include "expert fees," the Court found that nothing in the fee-shifting provision or the other provisions of the IDEA "provide[s] [States and school districts with] the clear notice that would be needed to attach such a condition to a State's receipt of IDEA funds." *Id.* at 300.

Of signal importance here, the Court reached that result in *Arlington* even though the reimbursement of expert fees found support in the IDEA's "overarching goal of 'ensur[ing] that all children with disabilities [are provided] a free appropriate public education' . . . as well as the goal of 'safeguard[ing] the rights of parents to challenge school decisions that adversely affect their child.'" *Id.* at 303 (citations omitted). This Court explained that such general goals do not provide the constitutionally mandated clear notice:

> These goals . . . are too general to provide much support for respondents' reading of the terms of the IDEA. The IDEA obviously does not seek to promote these goals at the expense of all other considerations, including fiscal considerations. Because the IDEA is not intended in all instances to further the broad goals identified by respondents at the expense of fiscal considerations, the goals cited by respondents do little to

bolster their argument on the narrow question presented here. [*Id.*]

B. Starting, as *Arlington* mandates, with the text of the relevant provision, the most natural reading of the language that Congress used in NCLB Section 9527(a) supports Petitioners.

1. Section 9527 is part of the "Uniform Provisions" subsection of the "General Provisions" of the NCLB, which sets out rules that apply across the board to the interpretation and implementation of the statute. By its placement and its terms, Section 9527(a) therefore speaks to how the NCLB, as a whole, is to be construed. In that regard, Section 9527(a) establishes two separate limitations on NCLB implementation that are designed to protect the prerogatives of States and school districts. One limitation—set forth in the first clause of the provision—states that "[n]othing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control, a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources." The other limitation, at issue here, is set forth in the final clause: "[n]othing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act."

That second clause, on its face, provides that the Act shall not be interpreted in such a way as to require States or school districts "to spend any funds or incur any costs not paid for under this Act." The District Court, however, declared that the language prohibits "unfunded requirements" only if they go "beyond those [requirements] provided for in the statute." Pet. App. 9a. That reading has nothing to

commend it. Presumably a requirement not "provided for in the statute" cannot be mandated whether it is funded or not, so, on the District's Court's reading, Section 9527(a) becomes mere surplusage. But even more to the point, Section 9527(a) provides without qualification that States and school districts cannot be required "to spend any funds or incur any costs not paid for under this Act," *period.* The District Court's conclusion that States and school districts *can* be forced to spend funds and incur costs on compliance requirements not paid for under the Act, as long as the requirements on which the State or school district is forced to spend its own funds are among the many requirements (*e.g.*, testing, data-collection, reporting and school-intervention requirements) "provided for" in the Act, is a highly strained reading of Section 9527(a), under which the statute falls far short of providing the clear notice that the Spending Clause requires.

2. Although seven of the members of the *en banc* court rejected both the analysis and the conclusion reached by the District Court, *see supra* at 12-13, the opinion written by Judge Sutton for six members of the court agreed with the District Court that Section 9527(a) does not prohibit requiring States and school districts to spend their own funds to comply with NCLB requirements. But the clear meaning Judge Sutton claimed to find in Section 9527(a) was not the same as the clear meaning the District Court thought it had found: according to Judge Sutton, Section 9527(a) "merely re-enforces the flexibility that the Act gives to school districts in developing their *own* local programs and spending their *own* funds in tackling local education matters." Pet. App. 156a.

That construction is just as untenable as the District Court's construction. Ensuring that school districts remain free to "develop[] their *own* local programs and spend[] their *own* funds in tackling local education matters" as they see fit is the office of the *first* part of Section 9527(a), which prohibits "mandat[ing], direct[ing], or control[ling] a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources." Hence, the construction proffered by Judge Sutton's opinion merely takes a somewhat different route than the District Court to arrive at the same result of reducing to surplusage the *second* part of Section 9527(a), which prohibits "mandat[ing] a State or any subdivision thereof to spend any funds or incur any costs not paid for under [the NCLB]."[7]

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[7] Judge Sutton also contended that because the language relied upon by Petitioners is "a single half-sentence 559 pages into the Act," Petitioners' understanding of Section 9527(a) would make it a stealth provision—an "'elephant[]'" hidden within the "'mousehole[]'" of an "'ancillary provision[].'" Pet. App. 159a-160a (quoting *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001)). As an initial matter, the meaning and import of an enactment does not hinge on its length or on which page it appears (otherwise the equal protection clause of the Fourteenth Amendment could be written off as a mere half-sentence in a document appended to the end of the Constitution). Besides, the placement of Section 9527(a) within the statute, far from concealing its import, makes its significance clear. Section 9527(a) is located among the "Uniform Provisions" set forth in Part E of NCLB Title IX's "General Provisions." Those provisions apply, across the board, to the entirety of the NCLB and include such fundamental matters as prohibitions against discrimination. *See* 20 U.S.C. §§ 7913, 7914. Furthermore, the relevant legislative history demonstrates that Congress was well aware of the significance of the "single half-sentence" that it enacted in NCLB Section 9527(a). That language appeared in three education statutes passed in

B. But Judge Sutton's discovery of "clear notice" in the NCLB was not in any event based principally on a construction of Section 9527(a) or of any other specific statutory text. Contrary to this Court's admonition in *Arlington* that the starting point and principal focus of the "clear notice" inquiry must be the statutory language, Judge Sutton does not even mention Section 9527(a) until late in his opinion, after first discussing at length his conception of "[t]he basic bargain underlying the Act," Pet. App. 141a, and the policy "centerpiece of the Act," Pet. App. 142a, which, in his view, should trump Petitioners' reading of Section 9527(a).

In its deployment of that analysis, Judge Sutton's opinion displays a technique by which courts may readily evade the clear notice requirement of this Court's Spending Clause jurisprudence—a technique the Court disapproved in *Arlington*. For the key to Judge Sutton's approach is the use of overbroad and unduly simplistic conceptions of the statutory *purpose* as a means of finding "clear notice" where statutory *language* points the other way.

1994 (the Goals 2000 Educate America Act, Pub. L. 103–227; the School to Work Opportunities Act, Pub. L. 103–229; and the Improving America Schools Act, Pub. L. 103–382), and was carried over into the NCLB. *See* Pet. App. 43a-47a (panel majority's discussion of the legislative history). During the 1993-94 legislative debates concerning an amendment that introduced the text that became that "single half-sentence" in the NCLB, the Members of Congress who spoke on the amendment uniformly made clear that the language was designed to prevent the Federal Government from imposing requirements on States and localities for which the federal government did not pay. *See* Pet. App. 45a (panel majority's discussion of the debates).

1. Judge Sutton's opinion begins by describing "[t]he basic bargain underlying the Act" as one in which States and school districts are "allocate[d] substantial federal funds" and given "substantial flexibility in deciding how and where to spend the money," for which the States and school districts "in return...must achieve progress in meeting certain educational 'outputs' as measured by the Act's testing benchmarks." Pet. App. 141a-142a. However, that formulation fails to acknowledge that a State that chooses to participate in the NCLB program has no way of knowing how "substantial" the Federal funds will prove to be. There is nothing in the statute that would prevent the Federal Government from providing a level of funding that is not remotely sufficient to enable the States to comply with the Act's requirements—which, as Petitioners' complaint alleges, is in fact what has happened; and Judge Sutton's position is that the States and school districts nevertheless are obligated to spend their own funds no matter how inadequate the Federal funding has proved to be.

There is no basis in the statutory language or structure for the notion that such an arrangement constitutes "the hallmark bargain at the core of this legislation," Pet. App. 159a. On the contrary, the "bargain" Judge Sutton posits would be an illusory one, because one side of the bargain—the amount of Federal funding that will be provided—is both indeterminate and unenforceable.

Equally misplaced are Judge Sutton's assertions that "accountability"—variously described in his opinion as "the centerpiece," "the essential objective," "the . . . backbone," and "the heartland" of the Act, Pet. App. 142a, 144a, 151a—is the single, overriding goal of the NCLB, and that Petitioners' understand-

ing of Section 9527(a) is "implausible" because it allegedly would undermine that goal.

Purporting to identify a single, overriding goal in a complex statutory scheme such as the NCLB—which occupies 670 pages in the United States Statutes at Large—is a dubious and perilous endeavor. It is in the nature of major legislation such as the NCLB that it will embody multiple purposes and that its provisions will reflect a number of political compromises pointing in different directions. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) ("Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.").

Here, to whatever extent "accountability" may be the "centerpiece" of the Act, it is error to assume that this means that Congress intended to impose "accountability," in the form of the Act's extensive requirements, *at whatever cost* to States and school districts. As this Court has explained:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646-47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original.)

It is precisely for these reasons that this Court in *Arlington* concluded that the "goals" of the IDEA were "too broad" to create "clear notice" of a condition placed on the acceptance of funds that was not apparent on the face of the statute itself, because the "goals" of the statute were tempered by "other considerations, *including fiscal considerations.*" 548 U.S. at 303 (emphasis added). That conclusion applies with even greater force here, given the specification in the NCLB that States and school districts are not to be required to pay for "costs not paid for under the Act."

To paraphrase this Court's discussion in *Arlington:*

> [The NCLB] obviously does not seek to promote [accountability] at the expense of all other considerations, including fiscal considerations. Because [the NCLB] is not intended in all instances to further [its] broad goals . . . at the expense of fiscal considerations, [those] goals . . . do little to bolster [the Secretary's] argument on the narrow question presented here. [548 U.S. at 303.]

2. The ease with which a "purpose"-based analysis such as Judge Sutton applied in his opinion can be used to nullify the clear notice rule is demonstrated by that opinion's exaggerated account of how Petitioners' understanding of Section 9527(a) would affect the posited "centerpiece" of "accountability," and by the opinion's failure to consider how the *Secretary's* approach would come "at the expense of fiscal considerations," *Arlington*, 548 U.S. at 303, which are equally a part of the legislative compromise.

a. Judge Sutton's opinion declares that, if Section 9527(a) is read as Petitioners have read it, States and school districts could avoid complying with NCLB

requirements whenever they unilaterally decided that Federal funding was insufficient. *See* Pet. App. 144a-145a. That is not what Petitioners contend; by its terms, Section 9527(a) applies to requirements that *in fact* are "not paid for" by Federal funding.[8]

Nor is Judge Sutton correct in his alternative contention that Petitioners' interpretation is unworkable because the flexibility that States and school districts retain in the particulars of their compliance undertakings makes it "impossible to calculate or even define the costs of complying with the Act's requirements." Pet. App. 148a. Under the NCLB, States and school districts unquestionably are incurring substantial costs that, in the absence of the statute, they would not be incurring due to their own programmatic choices. For example, prior to the enactment of the NCLB, no school district in the country was administering reading/language arts and mathematics tests to its entire student populations in grades 3 through 8 and in high school; grading schools based on the participation and performance of students on such tests both in the aggregate and

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[8] Under the NCLB scheme, a claim that a particular NCLB requirement should not be imposed on a State or school district because of a lack of Federal funding could arise in one of two ways, each of which would call upon *the Secretary* to make an administrative determination as to the merit of the claim. First, a State could request that the Secretary approve an amendment to the State's accountability plan to excuse compliance with the requirement. *See* 20 U.S.C. § 6311(f). Second, a State or school district electing to act unilaterally by ceasing to comply with a requirement of NCLB would face the prospect of the Secretary's taking enforcement action by instituting administrative proceedings. *See* 20 U.S.C. 1234c(a). In neither case would the mere assertion by a State or school district that federal funding is inadequate suffice.

by disaggregated NCLB subgroups; and taking the actions required by the NCLB against schools that did not achieve adequate test results for each student subgroup. The costs of such measures are plainly susceptible to calculation.

To be sure, in some instances there may be room to dispute whether a cost that a State or school district attributes to the NCLB is in reality a cost that would have been incurred even in the absence of the statute. But that is neither a new problem nor an insuperable one: under the longstanding supplement-not-supplant provisions of the ESEA, the Secretary has long made determinations as to what States and school districts would be spending on their programmatic activities in the absence of Federal funds. *See Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656 (1985) (upholding Secretary's order requiring a state to return federal funds that were used to supplant state expenditures).

b. At the same time, Judge Sutton's opinion gives no account to the harm that would befall States and school districts under the Secretary's interpretation, pursuant to which States and school districts would be required to bear anywhere from zero to one hundred percent of the substantial costs of fully complying with all of the requirements imposed on them by the NCLB, depending on the extent to which the Federal Government chooses to fund the NCLB from year to year. The direct consequence, when Federal funding is insufficient—as it has been to an extreme degree—is that States and school districts are forced to divert funds from their existing educational programs and priorities and press those scarce resources into service in meeting Federal requirements.

Given the "well established" principle "that education is a traditional concern of the States," *United States v. Lopez*, 514 U.S. 549, 580 (1995), the clear notice rule should apply with particular force where, as here, the putative condition on Federal funding would result in "the surrender of one of, if not the most significant of, the powers or functions reserved to the States by the Tenth Amendment—the education of our children." *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 566 (4th Cir. 1997) (*en banc*). Yet Judge Sutton's opinion, in exalting the interest in "accountability," sets at naught Congress's interest in avoiding the imposition on States and school districts of unfunded obligations that would leave those governments unable to devote their own resources to local educational priorities.

If the clear notice rule means anything, it means that a court cannot hold that a Spending Clause statute imposes massive obligations on States and local governments that run counter to a provision in the statute which, on its most natural reading, prohibits the imposition of those obligations, merely because the court deems the imposition of those obligations essential to a single "purpose" that the court has chosen to select from among the numerous different objectives and concerns that shaped the legislation.

C. Considered according to its terms and in context, Section 9527(a) reflects the answer to a fundamental policy question: if Federal funds fall short of what is required for full compliance with the NCLB's requirements, did Congress intend for States and school districts to fill the gap by diverting funds from their own educational programs and priorities, or did Congress intend for the NCLB's compliance

obligations to be tempered so as to avoid that result? This question reflects a judgment as to which sovereign's interests should give way in the event that Federal funding for the NCLB's ambitious goals falls short of what is necessary for States and school districts to implement fully its requirements. Congress's answer—as reflected in the plain language of Section 9527(a)—is that States and school districts should *not* be obligated to divert their own funds to meet all of the Federal Government's NCLB educational priorities. Given the substantial State and local interests at stake, it certainly cannot be said that this answer is so outlandish as to call for straining to read the language of Section 9527(a) out of the statute or abrogating the clear notice rule by means of tenuous inferences drawn from an exaggerated focus on only one of the multiple objectives Congress balanced in enacting the NCLB.

* * * *

If the decision below is allowed to stand, States and school districts will be required to divert substantial amounts of their limited resources from educational programs of their own choice to programs mandated by the Federal Government, in which (as the *amici* States explained, *see supra* at 10-11), the States and school districts agreed to participate on the understanding that, by virtue of Section 9527(a), they would *not* have to spend their own resources if sufficient Federal funding was not provided for these Federal initiatives. The District Court decision which the equally divided Court of Appeals has affirmed pulls the rug out from under the States and local governments through a construction of Section 9527(a) that is far from the most natural reading of the provision—indeed, the District Court's construction

effectively rewrites the provision. In turn, the six judges of the Court of Appeals who agreed with that result employed an approach that refuses to give Section 9527(a) its due simply because the provision, if given its natural meaning, would create a tension with one statutory objective which those judges deemed to be the sole touchstone for construing the NCLB, ignoring other objectives that are equally part of the congressional compromises that forged this major legislation.

The result is to subject States and school districts to enormous financial obligations of which they had no clear notice when they elected to participate in the NCLB. Because of the significance of that outcome, and because the decisions below fail to adhere to this Court's clear notice rule for Spending Clause legislation—and, in particular, are in conflict with *Arlington*—the case warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

PHILIP A. HOSTAK
NATIONAL EDUCATION ASSOCIATION
Office of General Counsel
1201 16th Street NW
Suite 820
Washington, DC 20036
(202) 822-7035

JEREMIAH A. COLLINS
Counsel of Record
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, NW
Suite 1000
Washington, DC 20005
(202) 842-2600

Attorneys for Petitioners

DENNIS POLLARD
419 Puritan Ave.
Birmingham, MI 48009
(248) 988-5690

Counsel for Petitioner School District of the City of Pontiac

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